No. 17642

In the

United States Court of Appeals

for the Ninth Circuit

MAURICE LIBERMAN, JOSEPH GREVEY and JACK GREVEY, co-partners, d.b.a. DUKE CITY LUMBER COMPANY, and DUKE CITY LUMBER COMPANY, a partnership,

Appellants,

vs.

GEORGE H. NAGEL, MABEL J. NAGEL, ROBERT T. JENKINS and GEORGIA MAE JENKINS, general partners, and GEORGIA MAE JENKINS, Trustee for JAMES HENRY NAGEL, limited partner, d.b.a. NAGEL LUMBER & TIMBER COMPANY, a limited partnership, and NAGEL LUMBER & TIMBER COMPANY, a limited partnership,

Appellees.

Response to Petition for Rehearing

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Response to Petition for Rehearing

In conformity with the order entered herein May 1, 1963 appellees respectfully respond to the first point discussed in appellants' Petition for Rehearing.

The petition charges that "this Court has failed to correct a clearly apparent, mathematical error in the computation of the 'loss of anticipated profits' * * *." Appellants appear to be striving to bring themselves within the rule that a petition for rehearing serves the very limited purpose "of directing the attention of the court to some controlling matter of law or fact which a party claims was *overlooked* in deciding a case * * *." *Anderson v. Knox,* 9 Cir., 300 F.2d 296, 297 (1962). The rule also confines the petition "to a concise statement (without argument) of the matter which the petitioner asserts the court *overlooked,* together with such references to such pages of the opinion and of the record on appeal and to such authorities as will enable the court to determine whether the matter referred to was *overlooked* * * *." Ibid. (Emphasis added)

I

This Court cannot be charged with *overlooking* an "error" never called to its attention; such an "error" cannot be said to be "clearly apparent". The deduction for interest sought by the petition is now urged for the first time. It was not covered by any assignment of error. It was not argued in the briefs or orally. Until the filing of the petition for rehearing no question with regard to said deduction existed on the appeal. "Generally one may not enlarge the scope of an appeal in a petition for rehearing." *Higa v. Transocean Airlines,* 9 Cir., 230 F2d 780, 786 (1956). "* * * it is too late to present a question for the first time on a petition for rehearing." *Bassick Mfg. Co. v. Adams Grease Gun Corporation,* 2 Cir., 54 F.2d 285 (1931).

Appellants state that the court below made a "mathematical error" in its computation of the "loss of anticipated profits"; and they say that this error lies in the "omission of any deduction for the 'interest cost' of the money which appellees would have had to invest in the purchase of the business if they had

been permitted to join in its purchase." Implicit in this statement is a representation that the court below found that a deduction for this item should be made but "omitted" doing so because of a "mathematical error", presumably through oversight or inadvertence. This representation is not correct. Appellants' present demand for an additional deduction for the interest cost of money was presented to the court below (R. 156-158), and was specifically rejected. This interest factor, as appears from the Memorandum Ruling (R. 196-198), had already been taken into account in fixing the profit figure of $4.71 per thousand board feet.

The court found from the facts and concluded from the law that all proper interest deductions had been made. If the method adopted by the court was erroneous, it did not constitute a "mathematical error". Such alleged error can be reviewed on appeal only if the ruling is challenged by an assignment of error. When not so challenged, an appellant cannot and should not be permitted to raise the point for the first time after an adverse decision on appeal under the guise of an asserted "mathematical error".

II

Appellants' failure to timely and properly urge their demand for an additional interest deduction in itself is a sufficient reason for denying the petition. Even if considered on the merits, it should be denied.

The evidence shows there are only three categories for which interest deductions should be allowed: interest actually payable on the purchase price; interest on working capital; and interest on invested fixed capital. In arriving at its net profit figure of $4.71 per thousand board feet the court made deductions for each category:

(a) $48,750, being the discounted present value of interest on the purchase price which the appellees would have

had to pay if they had been allowed to participate in the purchase;

(b) $1.70 per thousand board feet, for interest at 6% on $500,000 of working capital (R. 197: $240,000 ÷ 140,956,000 board feet);

(c) $.51 per thousand board feet, for the amount allowed as a deduction for interest paid by Nagels during the years 1952-59. (R. 197: $72,000 ÷ 140,956,000 board feet).

In their petition appellants frankly acknowledge deductions were made for items (a) and (b), but "overlook" the deduction made for item (c). This deduction alone, computed on the total production of 266,565,000 board feet and reduced to present value, amounts to $58,244.37. It exceeds the deduction sought on rehearing which, if given, would constitute a double deduction. As noted by the court, it would not be "sound in this particular instance". (R. 158)

The charge that this Court failed to correct a "clearly apparent, mathematical error" is without merit. There was no error in the court below which this Court overlooked or failed to correct—apparent, clearly apparent, mathematical, or at all. Interest deductions were fully allowed.

The judgment of the Trial Court should remain affirmed "in all respects".

Respectfully submitted,

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